No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

VS.

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN JEWISH CONGRESS

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QUESTIONS PRESENTED

(1) May the sentence imposed on a criminal defendant be based upon an evaluation by a judge or jury of the moral or societal worth of the crime victim?

(2) Did the prosecutor's closing argument in this case encourage the jury to base its decision in favor of capital punishment on such constitutionally impermissible considerations?

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INTEREST OF AMICI

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established to assist black citizens in securing their constitutional rights. In 1967 the Fund undertook to represent indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. The Legal Defense Fund currently represents several indigent condemned prisoners whose cases might be affected by the decision in the instant case.[1]

The American Jewish Congress is an organization of 50,000 members formed in

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[1] Copies of letters from the parties consenting to the filing of this brief have been filed with the Clerk.

1918 to protect the economic, civil, religious and political rights of American Jews. It has a continuing concern that the constitutional safeguards of equal protection of the law, due process and freedom from cruel and unusual punishment are assured all Americans. Although it is an organization which grounds its public policy views in a religious and ethical tradition, it believes that in order to give effect to these constitutional guarantees, a sentence may not be imposed on a criminal defendant based on the evaluation by a judge or jury of the moral or societal worth or religiosity of the crime victim.

SUMMARY OF ARGUMENT

This case, unlike Booth v. Maryland, L.Ed.2d 440 (1987), does not concern whether a sentencing decision may be

based in part on the harm suffered by the family of a murder victim. The question raised by prosecutor's closing argument in this case, and by the decision below, concerns whether a sentencing decision may turn on a jury's opinions about the moral worth or value to society of a victim.

For a judge or jury to impose a greater or lesser penalty in a criminal case, according to their opinions about the moral or societal worth of the victim, would violate one of the core meanings of the equal protection clause. That clause embodies two distinct principles, the familiar anti-discrimination doctrine, and an affirmative obligation on the part of a state to protect with equal vigilance the life, liberty and property of every person within its jurisdiction. While

the anti-discrimination doctrine forbids only certain distinctions, the protection principle prohibits any distinctions in the protection afforded by certain criminal and non-criminal laws. As Senator Poland insisted, "All the people, or all the members of a state or community, are equally entitled to protection."[2]

Although the eighth amendment permits a jury to consider a myriad of circumstances in making a sentencing determination, a jury may not utilize standards likely to reintroduce the arbitrariness condemned in Furman v. Georgia, 408 U.S. 238 (1972), or rely on constitutionally impermissible considerations. California v. Ramos, 463 U.S. 992, 1000 (1983). Permitting jurors

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[2] Cong. Globe, 39th Cong., 1st sess. 2962 (1866).

to base sentencing decisions on their opinions about the moral or societal worth of a victim would inevitably lead to such arbitrariness and improper considerations. Neither South Carolina nor any other state authorizes a sentencing jury to rely on such personal opinions. Many states do single out specific government positions for special protection, but the choice of those positions is always made by the legislature itself, and never left to the whims of particular juries.

The South Carolina Supreme Court, after reviewing the text of the prosecutor's argument at the sentencing hearing, properly concluded that the "remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter." State v.

Gathers, 369 S.E. 2d 140, 144 (S.C. 1988). The dispositive issue is not whether the prosecutor personally intended to violate the eighth or fourteenth amendment, but how a reasonable juror would have understood the prosecutor's statements. Francis v. Franklin, 471 U.S. 307, 315-16 (1985).

ARGUMENT

I. THE SENTENCE IMPOSED ON A CRIMINAL DEFENDANT MAY NOT BE BASED ON A JUROR'S OR JUDGE'S PERSONAL OPINION ABOUT MORAL OR SOCIETAL WORTH OF THE CRIME VICTIM

Two years ago, in a sharply divided opinion, this Court held that the sentence in a capital case could not be based on evidence regarding the harm which the crime might have caused to the family of a murder victim. Booth v. Maryland, 96 L.Ed.2d 440 (1987). This controversial aspect of Booth is not involved in the instant case. At the

penalty phase of the proceeding below, the prosecution neither adduced evidence that there had been injury to the family of the victim, Richard Haynes, nor suggested to the jury that a sentence of death was warranted by any such harm. If this Court wishes to reconsider the holding in Booth that a capital sentence may not be based on such harms to family members, it must do so in another case which actually presents that issue.

The instant case turns on a second, considerably less controversial aspect of the decision in Booth. The majority there also held that a capital sentence could not be based on "the character and reputation of the victim". 96 L.Ed.2d at 440. The court reasoned that there could be no

> justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than

> someone of questionable character. . . . We are troubled by the implication that defendants whose victims were assets to their community were more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.

96 L.Ed.2d at 450 and n.8. Booth addressed this issue because the Victim Impact Statement in that case contained a substantial and highly laudatory description of the victims. 96 L.Ed.2d at 453, 456.

But the Booth's rejection of such character evidence, unlike its disapproval of evidence regarding family members, involved no rejection of any judgment by the state legislature; the Maryland statute, in a murder case, did not authorize the inclusion in the VIS of any personal information about the victim except his or her identity. 96 L.Ed.2d at 446. In his brief in this Court, the

Maryland Attorney General defended the capital sentence in Booth solely on the basis of the evidence of injury to family members, and carefully avoided any suggestion that state law authorized, or that the federal constitution would permit, the imposition of a death sentence based on the perceived moral or societal worth of the victim. On the contrary, the state in Booth affirmatively insisted that it would indeed be improper to base a capital sentence on the "social status" or "religion" of a victim, and went so far as to urge that any juror inclined to do so ought be removed from the venire.[3] The

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[3] Brief for Respondent, No. 86-5020, p. 36-37. Similarly, in Mills v. Maryland, 100 L.Ed.2d 384 (1988), the state stressed "There was no evidence suggesting that the community at large suffered.... There was no evidence indicating that [the victim] led a life to be valued by others." Brief of Respondent, No. 87-5367, p. 33.

death sentence in this case was grounded on precisely the type of criterion which the state in Booth expressed acknowledged would indeed be improper.

A. The Imposition of Differing Sentences Based on the Perceived Moral or Societal Worth of Crime Victims Violates the Equal Protection Clause

A month ago Judge Jack Hampton of the Texas District Court openly proclaimed that it was his policy to impose lesser sentences in murder cases if the victim was either a prostitute or a homosexual. The Executive Director of the Texas Commission on Judicial Conduct, asked to comment on that sentencing standard, remarked, "I can't right off think of any part of the code that might violate."[4] Judge Hampton's sentencing practice, like

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[4] New York Times, Dec. 17, 1988.

the closing argument in the instant case,[5] violates one of the core meanings of the equal protection clause.

The debates of the Congress which approved the fourteenth amendment make clear that the framers understood the equal protection clause to embody two quite distinct but equally important principles. First, of course, the equal protection clause was recognized to prohibit invidious discrimination, an abuse then referred to as the making of distinctions on the basis of "class" or "caste."[6] The second agreed upon meaning

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[5] This Court held in McCleskey v. Kemp, 95 L.Ed.2d 262, 278 n. 8 (1987), that a sentencing decision based on unconstitutional distinctions among crime victims violates the rights of the person so sentenced to equal protection and to freedom from arbitrary government action.

[6] Cong. Globe, 39th Cong., 1st sess. 537 (Rep. Stevens) (race), 674 (Sen. Sumner) (race), 704 (Rep. Fessenden) (caste), 707 (Rep. Fessenden) (caste), 1095 (Rep. Hotchkiss) (class), 1227 (Sen.

was that a state had an affirmative obligation to protect from attack or invasion by third parties the lives, liberty, and property of all persons within its jurisdiction. Equal protection in this second sense concerned the protection accorded by the criminal law (e.g. prohibitions against murder, kidnapping and theft) and by certain non-criminal laws (e.g., tort and conversion).[7] It required a state to extend to the life, freedom and property of every person the same full measure of legal protection that was afforded to the lives, freedom and property of others.

Sumner) (caste or color), 2766 (Sen. Howard) (class), 3035 (Sen. Henderson) (race), app. 104 (Rep. Yates) (class) (1866).

7 In the hearings of the Joint Committee on Reconstruction, which drafted the fourteenth amendment, most uses of the word "protection" are references to government protection against crimes by third parties. See Appendix C(1).

The anti-discrimination principle applies to all forms of state action, but forbids only certain invidious distinctions; the protection principle applies only to state actions related to the protection of life, liberty and property, but forbids a state to deny full and equal protection on any basis whatever.

The phrase "equal protection of the laws" was originally coined by abolitionists early in the nineteenth century to refer to the protection principle; the history of the phrase and concept are detailed by Professor ten Broek in Equal Under Law (1951). Slavery was said to deny "equal protection" because it permitted some individuals, the slaveowners, to steal the property, violate the liberty and take the lives of others, the slaves. This argument was reiterated time and again by abolitionists

in the decades before the Civil War. In an 1837 address to the Massachusetts legislature, for example, Henry B. Stanton complained that a slave was denied

> all the protection of the law as a man. His labor is coerced from him.... No bargain is made, no wage is given.... There is not the shadow of legal protection for the family state among slaves ... neither is there any real protection for the limbs and lives of slaves.... [T]he slave should be protected in life and limb, in his earnings, his family, and social relations.... To give impartial real protection ... to all ... inhabitants would annihilate slavery. Give the slave then, equal protection with his master, and at its first approach slavery and the slavery trade flee in panic, as does darkness before the full-orbed sun.[8]

Although under the slave codes some attacks on slaves and their property were forbidden, the law fixed lesser penalties for a crime against a slave or free black

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8 Quoted in J. Ten Broek, Equal Under Law, 46-67 (1951).

than for the same offense against a white.[9]

This doctrinal derivation of the equal protection clause is reflected in the first draft of section one debated by the House of Representatives in 1866; that proposal would have given Congress authority to secure "to all persons in the several States equal protection in their rights of life, liberty and property."[10] Representative Wilson referred to the more elaborate theory familiar to congressmen on both sides of the aisle when he asserted

> "the right of being protected in life, liberty, and estate is due to all, and cannot be justly denied to any...." [T]he State that does not give protections to the life, liberty, and

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9 See W. Rose, A Documentary History of Slavery in North America, 193-94 (1976) (text of Alabama Slave Code).

10 Cong. Globe, 39th Cong., 1st sess. 1034.

> property of all men violates its duty, because every person has this due him for his allegiance to the Government....[11]

Even some who opposed the fourteenth amendment agreed that every state had a duty to give full and equal protection to the lives, liberty and property of all; they objected only that any needed corrective measures should come from the states themselves.[12]

The debates on the fourteenth amendment, to be sure, reveal as well a universal understanding that it would prohibit invidious discrimination. But it is entirely clear from those debates that the phrase "equal protection of the laws" was understood to encompass at least two distinct doctrines, entitlement to full and equal protection of life, liberty and

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11 Id. at 1225.

12 Id. at 1064 (Rep. Hale), App. 138 (Rep. Rogers).

property, and a prohibition against invidious discrimination. Representative Eliot, for example, described section one as including several distinct components, prohibiting "State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws."[13] Representative Rogers, who evidently agreed with the protection principle, nonetheless refused to accept the non-discrimination principle, arguing in favor of governmental racial discrimination in other areas, such as marriage and school segregation.[14]

Insofar as the protection by a state

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13 Id. at 2511.

14 Compare id. at app. 134 with id. at app. 138.

of life, liberty and property is concerned, the equal protection clause is not a provision which tolerate some but not other distinctions, but a prohibition against any distinctions whatsoever. Senator Wilson emphasized that the state's obligation to provide protection extended to all men, women and children in the jurisdiction; "Every human being in the country, black or white, man or woman, or little child in the cradle, has a right to be protected in life, in property, and in liberty."[15] Senator Poland insisted "All the people, or all the members of a State or community, are equally entitled to protection."[16] Senator Stewart recognized "the obligation of full protection for all men."[17] The requirement that blacks

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15 Id. at 1255.

16 Id. at 2962.

17 Id. at 2964.

receive equal protection was merely an incidental application of the general rule that all persons were to be so treated:

> [W]e do say that all men are equally entitled ... to the protection of the law, and that the weak need the protection of the law more than the strong; and we do say now that the negro in the south is manumitted ... he must be protected....[18]

Representative Pomeroy stressed that the degree of protection afforded to life, liberty and property could not vary in any way from person to person: "[E]very person should have the safeguards of law weighed out in equal and exact balances."[19] Representative Bingham

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18 Id. at 3528 (Sen. Stewart).

19 Id. at 1182; see also id. at 2459 (Rep. Stevens) (Congress must assure "that the law which operates upon one man shall operate equally upon all.... Whatever means of redress is afforded to one shall be afforded to all.") (emphasis in original), 2539 (Rep. Farnsworth) ("Is it not the undeniable right of every subject of the government to receive 'equal protection of the laws' with every

called on Congress to guarantee "equal, exact justice" by assuring "that the protection given by the laws of the State shall be equal in respect to life and liberty and property to all persons."[20]

When Representative Hale stated that he understood "the whole intended practical effect" of the first draft of section 1 to be "the protection of 'American citizens of African descent'", Representative Bingham immediately rose to disagree, explaining that the Joint Committee on Reconstruction -- which reported both that and the final version of the fourteenth amendment -- was equally concerned to afford protection to the "hundreds of thousands of loyal white citizens" facing abuse in the south.[21]

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other subject?")

20 Id. at 1094.

21 Id. at 1065.

The hearings of the Joint Committee, which were reprinted for and referred to by other members of Congress, contained extensive testimony regarding attacks on union loyalists in the former rebel states,[22] and concerning the unwillingness of local officials to protect their lives, liberty and property.[23] The report of the Joint Committee which accompanied the final draft of the fourteenth amendment emphasized the need to deal with this problem.[24] The congressional debates on the fourteenth amendment contained frequent references to the mistreatment of

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22 See Appendix C(2).

23 See Appendix C(3).

24 Report of the Joint Committee on Reconstruction, 39th Cong., 1st sess. xvi (southern loyalists "denounce[d] and revile[d])," xvii ("without the protection of United States troops, Union men, whether of northern or southern origin, would be obliged to abandon their homes"), xviii (southern loyalists "bitterly hated and relentlessly persecuted").

and southern hostility towards union supporters.[25] Proponents of the equal protection clause stressed that it would protect unionists who had remained in the south, union sympathizers who had fled north, former Union soldiers, and northerners visiting the south.[26] No one, however, described hostility to these groups as being based on "class" or "caste" -- the terms of that era for invidious discrimination. Union

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25 Cong. Globe, 39th Cong., 1st sess. 739 (Sen. Lane), 834 (Sen. Clark), 1091-94 (Rep. Bingham), 1182 (Sen. Pomeroy), 1184 (Sen. Henderson), 1228 (Sen. Sumner), 2535 (Rep. Eckley), 2537 (Rep. Beaman), 2542 (Rep. Bingham), 2800 (Sen. Stewart).

26 Id. at 1066 (Sen. Clark) (northerners), 1084-85 (Sen. Davis) (loyalists), 1094 (Rep. Bingham) (union soldiers), 2536 (Rep. Eckley) (union refugees), 2537 (Rep. Beaman) (loyalists), 2540 (Rep. Farnsworth) (loyalists), 2798 (Sen. Stewart) (loyalists); also id. at 1090 (Rep. Bingham) (aliens), 1757 (Sen. Trumbull) (aliens), 2890 (Sen. Howard) (aliens), 2891 (Sen. Cowan) (aliens).

supporters and northerners were to receive equal protection against attacks on their lives, liberty and property, not because of the motives behind those attacks or the official indifference to them, but because everyone was entitled to that protection, regardless of why he or she might need it.

The most detailed and impassioned explanations of the concept of equal protection denounced differences based on the wealth and status of the victim. Representative Bingham, one of the framers of section one, argued:

> [A]ll men are equal in the rights of life and liberty before the majesty of American law. Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every state of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights ... no matter what his color, no matter beneath what sky he may have been born, no

> matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant.[27]

Senator Wilson deplored the social and legal system of the south as a vestige of the worst of old world "aristocracies or oligarchies," which raised or lowered criminal punishments according to whether the victim was a "noble" or a "plebian."[28] Representative Donnelly asked

> Are [the] sacred pledges of life, liberty and property to fall to the ground? Shall the old reign of terror revive in the South, when no northern man's life was worth an hour's purchase. Or shall that great Constitution be what its founders meant it to be, a shield and a protection over the head of the lowliest and poorest

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27 Id. at 1094.

28 Id. at 683.

> citizen in the remotest region of the nation?[29]

Senator Howard, observed that the equal protection clause of the Fourteenth Amendment,

> establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives the most powerful, the most wealthy, the most haughty.[30]

In demanding protection for freedmen facing oppression in the former confederate states, Senator Wilson relied not on the anti-discrimination principle, but on the protection doctrine embodied in the equal protection clause:

> [T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and

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29 Id. at 586.

30 Id. at 2766; see also id. at app. 256 (Rep. Baker).

> proudest man in the land.... [T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land.... [T]he poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor....[31]

That is the meaning of the words engraved over the portico of the building in which this Court sits.

This concept of equal protection is utterly incompatible with any notion that a statute, judge or jury might value the lives of some persons more highly than the lives of others.[32] Representative Baker

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31 Id. at 343.

32 This aspect of equal protection does not, of course, preclude special treatment of murders which not only take a life but which also, in the judgment of a legislature, seriously interfere with the functioning of government, see Appendices A and B, or are perpetuated against

insisted that "[t]rue democracy, like true religion, recognizes the inherent and immeasurable value of man, and of all men."[33] Senator Clark acknowledged that society might be more affected by the death of one person than by that of another, but insisted that the law could not on that account treat the killing of one person as less blameworthy than the killing of another:

> Was not your Government founded upon that idea -- the idea of political equality of all men? Is [a black man] not entitled to his life as clearly and fully as the white man? That life may not be of the same consequence in the community as another life, but be it of more or less value, is not the negro just as such entitled to it as any other man can be to his?

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particularly vulnerable victims. See Del. Code Ann. tit. 11, § 4209(e)(q)(1982 supp.) (aggravating circumstance if "[t]he victim was severely handicapped or severely disabled.")

33 Cong. Globe, 39th Cong. 1st sess. app. 257 (emphasis in original).

> And has he not a right just as good to have it protected by law?[34]

A sentencing procedure which effectively required, or even allowed, a defendant to argue or seek to prove that his victim was of inferior moral or societal worth, entitled to only half-hearted protection by the legal system, would be more than a dangerous diversion from legitimate considerations, Booth v. Maryland, 96 L.Ed.2d at 451; to put the very victim of a crime on trial in this manner would offend one of the central guarantees of the fourteenth amendment.

As individuals we mourn with special sorrow the death of men and women whose particular gifts and promise we may have valued most highly. But the Constitution knows no such distinctions. The Fourteenth Amendment attaches to the

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34 Id. at 833 (emphasis added).

lives of those born in the opulence of Park Avenue, Palm Beach and Beverly Hills precisely the same immeasurable value that it recognizes in the lives of those who sleep on the heating vents on the Mall, who carry all their worldly possessions in a shopping cart, or who speak in unintelligible cadences to voices that none other hear. In other lands and under other legal systems, the measure of redress and punishment may yet be calibrated to the status and stature of the interested parties, but in the United States of America victim and perpetrator alike are neither rich nor poor, black nor white, revered nor reviled, believer nor heretic, but only persons whose greatest birthright is their equality.

B. The Eighth Amendment Precludes Basing the Magnitude of a Sentence on the Perceived Moral or Societal Worth of the Victim

Six years ago this Court held in California v. Ramos, 463 U.S. 992 (1983), that the range of factors which might be considered by a sentencing jury, although extremely broad, was nonetheless subject to several specific constitutional constraints. Ramos recognized that individualized sentencing decisions would require a jury "to consider a myriad of factors to determine whether death is the appropriate punishment," 463 U.S. at 1008, and Zant v. Stephens, 462 U.S. 862 (1983), made clear that a state was not required to spell out in a statute every aggravating consideration which a jury might take into account. 462 U.S. at 875. On the other hand, Ramos squarely held that the eighth amendment did impose

"substantive limitations on the particular factors that a capital sentencing jury may consider." 463 U.S. at 1000. One such constitutional constraint, Ramos noted, was that a jury could not utilize a standard which "might lead to the arbitrary and capricious sentencing patterns condemned in Furman [v. Georgia, 408 U.S. 238 (1972)]." Id.; see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Zant held that a state could not "attac[h] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example race, religion, or political affiliation...." 462 U.S. at 885. See also McCleskey v. Kemp, 95 L.Ed.2d 262, 278 n. 8 (1987); Gregg v. Georgia, 428 U.S. 153,\198 (1976).

Petitioner appears to contend that the constitution permits a capital sentencing decision to be based on the personal opinions of individual jurors regarding the value to society or the moral worth of a murder victim. That question arises in the instant case because the prosecution's closing argument appealed to the jury to base its sentence on just such opinions. See part II, infra. The constitutional issue here is the same as that which would arise if the judge had expressly instructed each juror to make a personal evaluation of the character and societal worth of the victim, and to consider that opinion in deciding on the appropriate sentence. We urge that the use of such personal opinions to decide whether a capital defendant will live or die is inconsistent

with Ramos, Zant and Gregg. See McCleskey v. Kemp, 95 L.Ed.2d 262, 278 n. 8 (1987).

If a deliberate attempt were to be undertaken to reintroduce into the capital sentencing process all the arbitrariness and potential for bias that flawed the pre-Furman capital punishment schemes, it would be difficult to concoct a more effective scheme for doing so than petitioner's proposal that jurors base sentencing decisions on their personal opinions about the character or value to society of a murder victim. This is not a case in which a legislature has determined that a specific governmental function, such as that of a police officer, is of unusual importance to society, and a jury has been authorized to make a factual determination as to whether the victim was in fact a police officer killed in the course of his or her duties. Rather, what

petitioner proposes is that each particular jury or other sentencing authority, choose for itself, from among the universe of personal characteristics and societal roles, those which it thinks are deserving of special protection. Petitioner asks, not that the jury in this case be permitted to implement a decision of the South Carolina legislature to extend such heightened protection to certain positions, but that each and every jury in South Carolina be permitted to make such legislative decisions for itself.

The statutes sustained in Gregg and its progeny were upheld because the objective standards they contained substantially reduced the danger that jurors would ground sentencing decisions on their personal social, political, or economic views, opinions often irrelevant

to the sentencing process and in many instances constitutionally impermissible. But a rule that based a sentencing decision on the "personal characteristics" or "value to society" of the victim would not simply permit, but quite literally require jurors to use such social, political, economic beliefs to decide which defendants would live and die. There is probably no question about which Americans are more likely to disagree than the identity of the individuals, other than certain critical government officials, who are of greatest value to our society, and whose deaths would be a particularly serious loss. The personal opinions which Furman, Gregg and Zant insist ought be irrelevant to the sentencing process would have to be relied on by a juror asked to assess the value to society, for example, of a union shop

steward, a venture capitalist, a newspaper columnist, a television evangelist, a professional lobbyist, a tobacco company lawyer, or a gun store owner.

A sentencing process based on such jury determinations would readily, perhaps inexorably, be tainted by considerations that would be constitutionally impermissible. That problem would inevitably extend to and taint the jury selection process; a prosecutor would naturally select a venue and exercise his peremptory challenges in order to craft a jury whose political, economic and social views would lead them to place particular value on the contributions of the victim. Regardless of the prosecutor's actions, a capital punishment statute would often have a different meaning in various parts of a single state depending on local mores and interests; thus within New York the

societal function deemed by local juries to be of particular value might be apple farmers in Cortland, oysterman on Long Island, the ski patrol in the Catskills, and Transit Authority workers in Manhattan. At best such a sentencing scheme would be a lottery, in which the life or death of a capital defendant would turn on the particular mix of social, economic and political views that chanced to prevail among the randomly selected jurors passing on his fate.

A sentencing decision based on the "personal characteristics" -- as distinct from value to society, to the extent that such a distinction could be made -- would be even more arbitrary. The personal characteristics on which a jury or judge might choose to rely are virtually

limitless.[35] In the instant case the prosecutor focused on the victim "as a religious person and the possessor of a voter registration card". (Pet. R. Br. 49). The Victim Impact Statement in Booth stressed that the victims there "had worked hard ... attended the senior citizens' center and made many devoted friends" 96 L.Ed.2d at 453. In Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987), the state emphasized that the victim had been "an honor graduate in high school" and was about to enter college.[36] A juror might

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35 See McCleskey v. Kemp, 95 L.Ed.2d 262, 295 n. 4 (1987) ("Some studies indicate that ... offenders whose victims are physically attractive receive harsher sentences than defendants with less attractive victims.")

36 809 F.2d at 748-49 n.12 (Johnson, J., concurring and dissenting); see also Moore v. Zant, 722 F.2d 640, 651-52 (11th Cir. 1984); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983) (victim a star athlete and social worker assisting underprivileged children).

well find virtually incomprehensible a request that he or she decide which of these personal characteristics militated for or against the death penalty. It is difficult to imagine how a juror, or a member of this Court, would go about deciding whether, and if so to what degree, a sentence of death would be supported by evidence that the victim was pious, diligent, friendly, a registered voter, a regular participant in senior citizen activities, or had good grades. It is equally difficult to imagine how an appellate court could "rationally review[]" the correctness of a capital sentence that turned on a jury's assessment of the moral or societal value of the victim. Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In assessing whether a particular sentencing system comports with the eighth

amendment, this Court refers to prevailing values reflected in state legislation. Thompson v. Oklahoma, 101 L.Ed.2d 702, 710 (Stevens, J.), 739-42 (Scalia, J. dissenting) (1988). Viewed in that context, a sentencing scheme which permitted jurors to rely on their personal opinions about a victim's character and value to society would be a unique, and virtually unprecedented, aberration. Among the 37 states which authorize the imposition of capital punishment, there is not a single statute which authorizes a sentencing jury or judge to consider the "personal characteristics" of the victim, or to assess the victim's "value to society." The South Carolina capital statute does not authorize a jury to attempt to consider such factors.

Many states, as Justice White observed in Booth, 96 L.Ed.2d at 458 n.2,

do single out certain primarily governmental positions, particularly police officers, for special treatment, either in defining capital murder or in the statutory list of aggravating factors.[37] But these statutes share two characteristics which emphasize the constitutional defects in petitioner's proposal. First every one of these statutes identifies specifically which government functions may -- and by omission may not -- be accorded particular value in the sentencing process, leaving the jury or judge no discretion whatever in the matter. In South Carolina, for example, the legislature has specified that the killing of a police officer, a judge or a prosecutor is an aggravating factor. S.C. Code Ann. § 16-3-

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[37] We set forth a list of those statutes in Appendix A.

20(c)(a)(5)-(7) (1986). If neither these nor any of the other statutory aggravating factors is present, a South Carolina jury cannot impose the death penalty, regardless of whether it believes the murder victim -- a mayor, for example-- was of great value to society; conversely, if the victim was a police officer, the jury must find the presence of an aggravating factor, even though it may believe the particular officer involved was so corrupt or inept that he should have been dismissed.

Second, all of the state capital statutes concerning killings of police, corrections, judicial and prosecution officials apply only to murders occurring in the course of, or in connection with, the victim's duties. Thus in South Carolina the killing of a police officer is only an aggravating factor if the

officer was murdered "while engaged in the performance of his official duties". S.C. Code Ann. § 16-3-20(c)(a)(7).[38] These statutes protect essential government functions, they do not attach increased importance to the lives of individuals as such. No state in the union attaches greater culpability to the killing of an adulterer by a jealous spouse, or to the random killing of a man on a park bench, solely because the victim was an off duty police officer.

In his dissent in Booth Justice White argued that "determinations of appropriate sentencing considerations are peculiarly questions of legislative policy". 96 L.Ed.2d at 458. It is precisely that

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38 See Appendix A. A number of other states address this issue, not by referring to the killing of certain officeholders, but by attaching special significance to any murder committed for the purpose of interfering with a governmental activity. See Appendix B.

legislative policy that is absent in this case. The Attorney General of South Carolina argues that a jury ought treat as an aggravating factor the "status" of the victim as "a judge, a policeman, or a street minister". (Pet. Br. 56). The simple answer is that the South Carolina legislature has made a different choice, to treat as an aggravating factor only the killing of judges and policemen, but not the murder of a "street minister," and to do so, not for every individual who has that particular "status", but only for individuals killed during or in connection with the conduct of their official duties. Petitioner asks this Court to authorize jurors in South Carolina to "substitute their own views for those of the state legislature as to the particular substantive factors to be considered in sentencing a capital defendant."

California v. Ramos, 463 U.S. 992, 1000 (1983).

We do not suggest that the South Carolina legislature could not extend such special protection to additional functions which it thought of critical value to society. Other states have constitutionally chosen to do so, treating as aggravating factors the killing, in connection with their official duties, of witnesses, jurors, and defense lawyers. A state legislature might choose to attach particular value to a non-governmental function; a Washington statute, for example, treats as an aggravating factor the killing of a reporter in order to hinder an investigation of the killer. Wash. Rev. Code Ann. § 10.95.020(10) (1981). But the selections of the public or quasi-public functions deserving such special protection "are peculiarly

questions of legislative policy." California v. Ramos, 463 U.S. at 1000. Neither Sought Carolina nor any other state treats as an aggravating factor the killing of a minister or registered voter, and it is entirely inconceivable that any legislature in the United States would authorize a jury, in deciding whether to impose the death penalty, to consider whether the victim was or was not religious, or adhered to a particular religious creed. To uphold a death sentence based on considerations which no legislature has authorized or would approve would be to stand eighth amendment jurisprudence on its head.

C. THE CONSTITUTIONAL ISSUE PRESENTED BY THIS CASE SHOULD BE DEFINITIVELY RESOLVED

Because no statute authorizes a sentencing decision to be based on a jury's or judge's personal opinions about

what constitutes moral or societal worth, there are only a handful of reported cases in which a prosecutor sought to win a capital sentence on such a basis. The instant case is particularly unique because the prosecutor asked the jury to ground its sentencing decision on the fact that the victim was "a religious person". State v. Gathers, 369 S.E.2d 140, 143 (S.C. 1988). Although that argument raises serious problems under the Establishment Clause, we believe it would be inappropriate to resolve this case on first amendment grounds; to do so would be to require respondent to run the risk that on remand the prosecutor would again urge the jury to impose the death penalty because the victim in this case was a registered voter. That argument violated the eighth and fourteenth amendment when it was advanced at the original sentencing

hearing, and the Court should not leave the prosecutor free to repeat that violation.

Equally importantly, the efficient administration of justice would be ill-served by a decision in this case which, rather than addressing the permissibility as such of basing a sentencing decision on the perceived moral and societal worth of the victim, dealt only with the particular personal characteristics -- piety and voter registration -- on which the prosecutor happened to rely in this case. A decision by this Court leaving open the possibility that other personal-characteristic arguments might be upheld would inevitably encourage a form of abuse that has hitherto been comparatively rare; the capacity of a constitutional decision to actually encourage misconduct was well illustrated

by experience under Swain v. Alabama, 380 U.S. 202 (1965). See Batson v. Kentucky, 476 U.S. 79 (1986).

In the absence of a definitive resolution of the constitutionality of personal characteristic arguments, the prosecutor on remand in this case, like prosecutors in literally thousands of capital cases in years ahead, would be invited to seize upon some other personal characteristic of the victim as a basis for a sentence of death. A decision on eighth or fourteenth amendment will pretermit this entire problem, but a decision addressing only the specific prosecution arguments in this case would in all probability launch a major new branch of constitutional jurisprudence, requiring the courts to assess on a case by case basis the constitutionality of sentences based on every conceivable

function valuable to society that a given victim might have played, and on any imaginable laudable personal character trait that a particular victim might have possessed.

Equally seriously, for this Court to suggest that the lives of some human beings may constitutionally be accorded greater value and protection would necessarily legitimize and encourage the view that other lives are entitled to less. The dangers with which the framers of the equal protection clause were concerned remain real, if more complex, today. The failure of the criminal justice system to provide protection for wives from spousal abuse, for example, remains a widespread problem. Judicial suggestions that lethal attacks on certain types of individuals are less deserving of punishment would inevitably shape the

willingness of the police to investigate such crimes, and would imply to members of the public that such murders enjoy a degree of official sanction or tolerance.

II. THE PROSECUTOR'S CLOSING ARGUMENT ENCOURAGED THE JURY TO BASE THE SENTENCING DECISION ON ITS PERCEPTION OF THE MORAL OR SOCIETAL WORTH OF THE CRIME VICTIM

Booth, of course, did not hold that evidence regarding the personal characteristics of a victim may never be introduced or referred to by a prosecution; on the contrary the Court observed in Booth that in a particular case such evidence may be relevant to a material issue regarding either guilt or sentencing. 96 L.Ed.2d at 451 n.10. Evidence regarding the religious views of a victim, or defendant, may in some instances be relevant to such a legitimate

issue.[39] Booth admonished, however, that the courts must assure that the probative value of evidence regarding the personal characteristics of a victim outweighs any prejudicial effect. Id.[40] The courts must also be certain that the purported relevance of personal-characteristic

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[39] In a murder prosecution arising out of a fight between the victim and defendant, for example, it might be of controlling importance which participant had initiated the fight and which was defending himself; in resolving that issue a jury might well consider whether either participant adhered to moral views--whether of a sectarian or secular origin -- which condemned violence other than in self defense. At a sentencing hearing a defendant's attitude towards violence would be material to his future dangerousness, Franklin v. Lynaugh, 101 L.Ed.2d 155, 168 (White, J.) (1988), and that attitude might be demonstrated by the moral tenets to which he adhered, whether they were the principles of his purely personal philosophy, of the Ethical Culture Society or of an organized religious group.

[40] Brooks v. Kemp, 762 F.2d 1383, 1409 (5th Cir. 1985); Moore v. Kemp, 809 F.2d 702, 748 (11th Cir. 1987) (Johnson, J., concurring and dissenting).

evidence or argument does not itself turn on unreliable or class based stereotypes or assumptions.[41]

The instant case involves, not the admissibility of evidence, but the content and likely impact on the jury of the prosecutor's argument at the penalty phase of the trial. A substantial portion of the prosecutor's closing argument dwelt on the religious views of the victim. The South Carolina Supreme Court concluded that "[t]hese remarks conveyed the suggestion appellant deserved a death

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[41] In the instant case, for example, the South Carolina Attorney General appears to suggest that detailed comments about the religious character of the victim were appropriate because that evidence indicated that the victim was less able or inclined to defend himself as a result of his piety. If religious belief actually tended to render the pious incapable of using force against others, the United States Army would not have a large corps of chaplains, and words like "crusade" and "jihad" would not be part of our vocabulary.

sentence because the victim was a religious man and a registered voter." Id. Petitioner does not dispute this description of the unavoidable effect on the jury of the state's closing argument, and could not plausibly do so. The prosecutor's closing remarks are devoid of any contention that the victim's piety or voter registration were evidence of some other legally relevant fact; the prosecutor baldly dwelt at length on several aspects of the victim's character and admonished the jury to consider them when deciding on the appropriate sentence. In the absence of a clear and unequivocal argument specifically relating a victim's personal characteristics to some other factor which a jury might legitimately consider, any prosecutorial reference to such characteristics will necessarily suggest that the characteristics are

sufficient by themselves to support a sentence of death. No juror could have understood the prosecutor's remarks in the instant case in any other way.

Petitioner urges, however, that the validity of the jury's sentencing decision does not depend on the objective meaning of the prosecutor's closing remarks, but turns instead on the subjective intent with which the prosecutor spoke. (Pet. Br. 45). So long as the prosecutor did not actually intend to encourage the jury to vote for death because of the victim's piety and voter registration, the state appears to contend, it simply is not relevant that the actual remarks made by the prosecutor had precisely that effect. Petitioner relies heavily on the decision in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), that the courts will not "lightly infer that a prosecutor intended" to

violate the constitutional rights of a defendant. (Pet. Br. 45).

The bona fides of the prosecutor's argument in this case, we submit, are not the controlling issue. It was the jury, not the prosecuting attorney[42], which fixed the sentence of death, and if there was a significant danger that the jury based its decision on a constitutionally impermissible consideration -- as was surely the case here -- it would be of no significance that the prosecutor harbored deeply felt but never articulated hope that the jury would not do so. "The question ... is not what" the prosecutor intended, "but rather what a reasonable juror could have understood the [argument]

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42 Of course, if a prosecutor's decision to seek the death penalty were tainted by a constitutionally impermissible consideration, that penalty could not stand. See McCleskey v. Kemp, 95 L.Ed.2d 262 (1987).

as meaning." Francis v. Franklin, 471 U.S. 307, 315-16 (1985); see California v. Brown, 93 L.Ed.2d 934, 940 (1987). This case, unlike Donnelly, 416 U.S. at 613, does involve the violation of a specific substantive constitutional rights, not merely a general claim of unfairness., See Caldwell v. Mississippi, 472 U.S. 320, 339-40 (1980). We urge that the South Carolina Supreme Court correctly focused on the objective meaning of the prosecutor's closing remarks, and properly eschewed any inquiry into the prosecutor's subjective intent.

Our advocacy of this objective standard, however, should not be understood to suggest that there is any possibility that the prosecutor in this case did indeed act in good faith. On the contrary, the record reveals a consistent and extraordinarily persuasive effort to

bias the jury's decision -- at the guilt as well as the penalty phase -- with concern for the religious views of the victim. Although the victim in this case had no religious training or position, the prosecutor referred to him as "Reverend" or "Reverend Minister" Haynes on 4 occasions in his opening statement, 13 times in his closing statement on guilt, and 16 times during his closing statement regarding penalty.[43] At the beginning of the trial the prosecutor emphasized to the jury that the victim was "a very, very religious person" who "had many, many

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[43] Tr. 554-55, 1036-56, 1205-11. The only foundation of these references was an isolated statement by the victim's mother that the victim liked to call himself Reverend Minister. Id. at 563. Neither the victim's mother nor any other witness ever themselves referred to the victim as Reverend. In colloquy with the trial judge outside of the presence of the jury, the prosecutor referred to the victim simply as "Richard Haynes." Id. at 1179.

religious items -- Bibles, rosaries, statues."[44] In his closing argument at the end of the guilt phase, the prosecutor urged:

> [P]ut in your mind's eye, if you would, the perspective of Reverend Minister Rickey Haynes. What do we know about him? .... [H]e was a religious person. You will have his Bibles there. You will see his rosary beads. His statues of little angels.[45]

The critical factual issue at the guilt phase was whether Gathers was actually the person who stabbed and sexually assaulted the victim;[46] the Bibles, angels and rosary beads obviously could not help to identify the victim's assailant. Even if the victim's religious views had been

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[44] Tr. 553; see also id. at 554 ("This religious person -- who, by the way, called himself Reverend Minister Haynes.")

[45] Tr. 1051.

[46] Tr. 1032-77.

relevant to some issue at the penalty phase -- which they clearly were not -- no legitimate purpose was served by the prosecutor's insistence on reading to the jury the full text of a prayer that had been in the victim's possession, or by the repeated references to the religious objects in the victim's possession at the time of the killing. It is not unduly cynical to suggest that none of this would have occurred had the victim adhered to non-orthodox religious views, and had in his possession not an angel, a bible, and the Game Guy's Prayer, but a voodoo doll, a satanic tract, and a blessing written by the Ayatollah Khomeini.

The state's effort to justify the prosecutor's conduct is entirely unavailing. In this Court the state does not even attempt to provide any explanation of the reading of the Game

Guy's Prayer, the repeated reference to the victim's bibles, rosary beads, and angels, or the closing argument about Haynes' voter registration card. The Attorney General asserts that some reference to the victim's religion was appropriate because "[s]imply put, it was the state's theory of the case that the motive and reason that Ricky Haynes was assaulted and murdered was because he .... was willing to talk to people all the time about the Lord from the park bench." (Pet. Br. 46). In fact the theory of the case which the prosecutor actually presented to the jury was precisely the opposite--that Haynes was attacked after he <u>refused</u> to talk to his assailants,[47] and that Gathers was particularly culpable because he was <u>indifferent</u> to the fact that his

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47 Tr. 554, 631, 1053-54.

victim happened to be a religious person.[48]

The state urges, in the alternative, that under Booth a prosecutor may indeed urge a jury to impose the death penalty based on the personal characteristics of the victim, so long as the evidence on which the prosecutor relies was first introduced for some other reason. (Pet. Br. 22, 24, 47, 50). Once testimony regarding Haynes' religious views had been admitted for another purpose, the state suggests, the prosecutor was free to argue that it was a more serious crime to kill a pious man than to kill an atheist or an agnostic. Were that the law, a prosecutor could constitutionally urge a jury to impose capital punishment because the

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48 Tr. 1208 ("[T]his defendant Demetrius Gathers cared little about the fact that [Haynes] is a religious person").

victim was white, or belonged to the same religious denomination as the jurors or supported a particular political party, so long as the underlying facts had already been disclosed to the jury for other reasons.

CONCLUSION

When most of North America was still an untamed wilderness, Sir William Hawkins wrote that it was equally murder to kill "any person, whatsoever nation or religion he be of, or of whatever crime attainted." A Treatise of the Pleas of the Crown, v. 1, p. 80 (1716).[49] Two and a half

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49 See also W. Blackstone, Commentaries on the Laws of England, v. iv, pp. 197-98 (murder includes the killing of any person "'under the Kings peace,' at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the King's peace and protection, is as much murder as to kill the most regular-born Englishman") (1765); T. Wood, An Institute of the Laws of England, 352 (murder to kill any "reasonable creature, man or woman, subject or alien; whether attainted of

centuries of jurisprudence have not improved upon that formulation. This case does not call for the invention of any new, unprecedented legal theory; we ask only that the Court adhere to principles of justice that were already of ancient vintage when they were written into tne Constitution by the framers of the eighth and fourteenth amendments. The decision

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treason or felony, ... Christian or heathen. And the reasonable creature must be born alive.") (3rd ed. 1724).

of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

CAPITAL STATUTES CONCERNING PUBLIC OR QUASI-PUBLIC OFFICIALS

Alabama Code (1982)

§13A-5-40 (a)(5) (law enforcement official when "on duty or because of some official or job related act")

§13A-5-40(a)(7)(present or former federal or state official if murder "stems from or is related to his official position act or capacity")

Arkansas Code Annotated (1987 Supp.)

§5-10-101(a)(3)(law enforcement or corrections officer, firefighter, judge, court official, parole or probation officer, or military personnel "when such person is acting in line of duty")

§5-10-101(a)(5)(holder of any public office "filled by election or ap-

pointment or a candidate for public office")

California Penal Code (1987 Supp.)

§190.2(a)(7)(peace officer whom defendants "knew or should reasonably have known" was "engaged in the performance of his duties" or who was killed "in retaliation for the performance of his official duties")

§190.2(a)(8)(federal or state law enforcement officer whom the defendant "knew or should reasonably have known" was "engaged in the performance of his duties" or who was killed "in retaliation for the performance of his duties")

§190.29a)(9)(fireman whom defendant "knew or reasonably should have known . . . was a fireman engaged in the performance of his duties")

§190.2(a)(10)(witness killed to prevent or in retaliation for testimony)

§190.2(a)(11)(prosecutor killed "in retaliation for or to prevent the performance of the victim's official duties")

§190.2(a)(12) (present or former judge killed "in retaliation for or to prevent the performance of the victim's official duties")

§190.2(a)(13)(present or former federal, state or local official killed "in retaliation for or to prevent the performance of the victim's official duties")

Colorado Revised Statutes (1986)

§16-11-103(6)(c) (firefighter, elected official, state or local peace officer, present or former federal law enforcement officer "killed . . . while such person was engaged in his

official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of his official duties, or the victim was intentionally killed in retaliation for the performance of his official duties.)

§16-11-103(6)(k)(witness to a criminal offense killed to prevent arrest or prosecution)

Delaware Code Annotated Title 11 (1979)

§636(a)(4)(law enforcement or corrections officer or fireman "while such officer is in the lawful performance of his duties")

§4209(e)(1)(c)(law enforcement or corrections officer or fireman "while such victim was engaged in the performance of his official duties")

§4209(e)(1)(d)(prosecutor, judge or state investigator "during, or because of, the exercise of his official duty")

§4209(e)(1)(g)(witness killed to prevent testimony regarding a crime)

Georgia Code Annotated (1979)

§27-2534.1(b)(5)(present or former judge or prosecutor "during or because of the exercise of his official duties")

§27-2534.1(b)(8)(peace or corrections officer or fireman "while engaged in the performance of his official duties")

Idaho Code (1982)

§18-4003(b)(judge, executive officer, police officer, fireman, prosecutor or court officer "who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting")

(1987)

§19-2515(g)(9)(present or former peace officer, judge or prosecutor killed "because of the exercise of official duty")

§19-2515(g)(10)(witness or potential witness in a criminal or civil proceeding "because of such proceeding")

Illinois Annotated Statutes, Chapter 38 (1987 Supp.)

§9-1(b)(1)(peace officer or fireman killed "in the course of performing his official duties" if defendant "knew or should have known that the murdered individual was a peace officer or fireman")

§9-1(b)(2)(corrections official killed "in the course of his official duties")

§9-1(b)(8)(witness or informant against defendant in a criminal proceeding)

Indiana Code Annotated (1987 Supp.)

§35-50-2-9(c)(b)(murder of "a corrections employee, fireman, judge, or law enforcement officer and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty")

Kentucky Revised Statutes Annotated (1981)

§532.030(a)(5)(prison employee killed while "engaged . . . in the performance of his duties" by an inmate)

§532.030(a)(7)(police officer "engaged at the time of the act in the lawful performance of his duties")

Louisiana Revised Statutes (1982)

§14.30(2)(law enforcement corrections, parole or probation officer, judge or prosecutor while "engaged in the performance of his lawful duties")

Maryland Code Annotated (1987)

Art. 27 §413(d)(1)(law enforcement officer "murdered while in the performance of his duties")

Missouri Annotated Code (1987 Supp.)

§565.012(2)(5)(present or former judge, prosecutor or elected official "during or because of the exercise of his official duty")

§565.012(2)(8)(peace or corrections officer or fireman "while engaged in the performance of his official duty")

Montana Code Annotated (1985)

§46-18-303(6)(peace officer "killed while performing his duty")

Nebraska Revised Statutes (1985)

§29-2523(1)(g)(any official "having custody of the offender or another")

Nevada Revised Statutes Annotated (1986)

§200.033(7)(peace officer or fireman "killed while engaged in the perform-

ance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman")

New Mexico Statutes Annotated (1978)

§31-20A-5(A)(peace officer "acting in the lawful discharge of an official duty when he was murdered)

§31-20A-5(D)(corrections official killed by prison inmate)

§31-20A-5(F) (witness to a crime to prevent, or in retaliation for, testimony)

New Jersey Statutes Annotated (1988 Supp.)

§2C:11-3(c)(4)(b)(certain public servants killed "while the victim was engaged in the performance of his official duties or because of the victim's status as a public servant")

North Carolina General Statutes (1981 Supp.)

§15A-2000(e)(g)(law enforcement or corrections official, or present or former judge, prosecutor, juror or witness against perpetrator if killed "while engaged in the performance of his official duties because of the exercise of his official duty")

Ohio Revised Code Annotated (1982)

§2929.04(A)(1)(president, president-elect, vice-president, vice-president-elect, governor, governor-elect, lieutenant-governor, lieutenant-governor elect, or candidate for any of those offices)

§2929.04(A)(6)("law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's

specific purpose to kill a law enforcement officer")

Oklahoma Statutes (1987)

§701.12(law enforcement or corrections officer killed "while in performance of official duty")

Pennsylvania Consolidated Statutes Annotated (1982)

§9711(d)(1)(law enforcement or corrections officer or fireman "killed in the performance of his duties")

§9711(d)(s)(witness to felony committed by perpetrator, killed to prevent testimony)

South Carolina Code Annotated (1986 Supp.)

§16-3-20(a)(5)(judge or prosecutor "during or because of the exercise of his official duty")

§16-3-20(a)(7)(law enforcement or corrections officer or fireman "while

engaged in the performance of his official duties")

South Dakota Codified Laws (1988)

§23A-27A-1(4)(present or former judge or prosecutor while "engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of" the victim)

§23A-27A-1(7)(law enforcement or corrections officer or fireman "while engaged in the performance of his official duties")

Tennessee Code Annotated (1982)

§39-2-203(i)(9)(law enforcement or corrections officer or fireman "who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections

employee or fireman engaged in the performance of his duties")

§39-2-203(i)(10)(prosecutor or present or former judge killed, "due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office")

§39-2-203(i)(11)(elected official killed "due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official")

Vermont Statutes Annotated (1982 Supp.)

Title 13, §2303(c)(law enforcement or corrections officer killed "while in the performance of the duties of his office")

Washington Revised Code Annotated (1982)

§10.95.020(1)(law enforcement or corrections officer or firefighter "who was

performing his or her official duties at the time of the act . . .and . . . was known by the person to be such at the time of the killing")

§10.95.020(6)(judge, prosecutor, defense attorney, probation or parole officer, present or former juror, present or former witness whose murder "was related to the exercise of official duties performed or to be performed by the victim")

§10.95.020(10)(news reporter killed "to hinder the investigative, research, or reporting activities of the victim")

Wyoming Statutes (1983)

§6-4-102(h)(vii)(judge or prosecutor "dur-"ing or because of the exercise of official duty")

United States Code

18 U.S.C. §351(a)(member of Congress, member of Congress elect, agency heads, Supreme Court Justice)

18 U.S.C. §175(a)(president, president-elect, vice-president, vice-president elect, and certain White House employees)

APPENDIX B

CAPITAL STATUTES CONCERNING INTERFERENCE WITH GOVERNMENT FUNCTIONS

Alabama Code (1982)

§ 13A-5-49(5) (murder to avoid arrest or effect escape from custody)

Arkansas Code Annotated (1987)

§ 5-4-604(5) (murder to avoid arrest or escape from custody)

§ 5-4-604(7) (murder "for the purpose of disrupting or hindering the lawful exercise of any government or political function")

California Penal Code (1987 Supp.)

§ 190.2(a)(5) (murder to avoid arrest or effect escape from custody)

Colorado Revised Statutes (1986)

§ 16-11-103(6)(k) (murder to avoid arrest or prosecution or to effect escape from custody)

Delaware Code Annotated Title 11 (1979)

§ 636(a)(7) (murder to avoid arrest or effect escape)

§ 4209(e)(1)(b) (murder to avoid arrest or effect escape)

Florida Statutes Annotated (1985)

§ 921.141(5)(e) (murder to avoid arrest or effect escape)

§ 921.141(5)(g) (murder "to disrupt hinder the lawful exercise of any government function or the enforcement of the laws")

Georgia Code Annotated (1979)

§ 27-2534.1(b)(10) (murder committed to avoid or interfere with arrest or lawful custody of a police officer)

Idaho Code (1982)

§ 18-4003(f) (murder while escaping from a penal institution).

Maryland (1982)

§ Art. 27, § 413(d)(3) (murder "in furtherance of an escape" from custody)

Mississippi Code Annotated (1987 Supp.)

§ 99-19-101(5)(e) (murder to avoid arrest or escape from custody)

§ 99-19-101(5)(g) (murder "to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws")

Missouri Annotated Code (1987 Supp.)

§ 565.012(2)(10) (murder to avoid arrest or escape from custody)

Nebraska Revised Statutes (1985)

§ 29-2523(1)(h) (murder "to disrupt or hinder any governmental function or the enforcement of the laws")

Nevada Revised Satutes Annotated (1986)

§ 200.033(5) (murder to avoid lawful arrest or to effect escape from custody)

New Hampshire Revised Statutes Annotated (1986)

§ 630.5(II)(a)(5) (murder to avoid arrest or to effect escape from lawful custody)

New Jersey Statutes Annotated (1988 Supp.)

§ 2C:11-3(c)(4)(f) (murder to escape detection, apprehension, trial or confinement for another offense)

North Carolina General Statutes (1981 Supp.)

§ 15A - 2000(e)(4) (murder to avoid arrest or escape from custody)

§ 15A - 2000(e)(7) (murder "to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws")

Oklahoma Statutes (1987)

§ 701.12(5) (murder to avoid arrest or prevent prosecution)

South Dakota Codified Laws (1988)

§ 23A-27A-1(9) (murder to avoid lawful arrest or to interfere with lawful custody)

Tennessee Code Annotated (1982)

§ 39-2-203(i)(6) (murder to avoid or interfere with lawful arrest or prosecution)

Utah Code Annotated (1987 Supp.)

§ 76-5-202(1)(e) (murder to avoid arrest or escape from lawful custody)

§ 76-5-202(1)(h) (murder to prevent person from testifying, or participating in any legal proceeding or official investigation)

Washington Revised Code Annotated (1982)

§ 10.95.020(7) (murder committed to conceal the commission of a crime or the identity of the perpetrator)

Wyoming Statutes (1977)

§6-4-102(h)(v) (murder to avoid arrest or effect escape from custody)

APPENDIX C(1)

HEARINGS OF THE JOINT COMMITTEE ON RECONSTRUCTION

(1) References to "Protection"

In each quotation the emphasis is added.

Part I, pp.107-08 (Major General Hatch):

"A: [T]he negro knows that without his rights secured, and his life and property secured, he is not safe from the poor whites. He understands their antipathies towards him as well as any one does ....
Q: They need the government for their protection.
A: Yes, sir."

Part I, p.109 (Major General Thomas):

"[I]f the affairs of the Freedman's Bureau can be administered for another year in the way they have been administered for the last six months, mutual confidence would be restored between the whites and the blacks; and I am very much in hopes that the freedmen could then be left to the protection of the civil authorities of the State."

Part I, p.112 (Major General Fisk):

"A: The great mass of freedmen in the State of Tennessee ... need the protection of the government very much ...
Q: Why do they need it.
A: On account of the opposition of the people freedmen and justice to the negro."

Part I, p.114 (Major General Fisk):

"Q: Is there now safety to the Union people of the State of Tennessee?
A: ... A large delegation of the citizens of Memphis waited on me not long ago and stated that they were cruelly oppressed by the rebel element of the population in that section, and they feared the military protection was to be withdrawn from the state; and they stated to me that if the military was withdrawn those persons in most portions of West Tennessee who had been early and consistent friends of the government, and loyal to it, would be compelled to withdraw with the military."

Part I, p.119 (Lt. Colonel Cochrane):

"Q: Are the lives, and is the property of Union people of the State who have borne arms in the federal cause safe and protected at this time?
A: Yes, sir. I do not know how it would be if the troops were taken away from the State.
Q: Do you believe the troops could be safely withdrawn at this time?
A: I do not ...."

Part I, p.121 (Lt. Colonel Barnard):

"Q: Is it your opinion that [the Union people] are thoroughly protected in all their rights and privileges?
A: I think they have their rights and privileges by sufferance.
Q: What is the condition of the freedmen in Tennessee ... are they now protected in their rights of person and property?
A: As a general thing, I think they are by their employers."

Part II, p.4 (Major General Turner):

"All the people [of Virginia] are extremely reluctant to grant to the negro his civil rights -- those privileges that pertain to freedom, the protection of life, liberty and property before the laws .... They are all very reluctant to concede that; and if it is ever done, it will be because they are forced to do it."

Part II, p.7 (Judge John Underwood):

"[T]he condition of the loyal white man in Virginia at this time is worse even than the condition of the colored man, inasmuch as the colored man is protected by the military authority, while the white man is not."

Part II, p.19 (Dr. G.F. Watson):

"Q: Suppose the restraint arising from the presence of Union forces in Virginia was withdrawn, and suppose the Freedmen's Bureau was withdrawn,

what would be the condition of the loyalists and freedmen in Virginia?
A: There would be no protection for Union men, and the freedmen would necessarily suffer much.
Q: Would there be scenes of riot and violence?
A: I think it probable."

Part II, pp.23-24 (George Tucker):

"The freedman ... a Yankee ... a native-born citizen of Virginia who has been a loyal man ... all of them, will be compelled to leave [Virginia], just as soon as they cease to be protected by the national power. They cannot stay there. I am intimately acquainted with the Union men of Fairfax County ... and I do not know one of them who does not feel that he has got to leave ... . [I]f they understood that they would be surely protected in their natural and political rights, they would ... remain."

Part II, p.20 (Josiah Millard):

"A: ... [U]nless Congress relieves us by giving us some other kind of government ... that will protect the Union men, the firm Union men, who have been firm to the government, have got to leave Virginia and the south. They cannot remain there. It would not be safe for me to go back on my farm and reside there.
Q: What have you to apprehend?
A: From their threats I apprehend personal violence.

Q: Are such threats of frequent occurrence?
A: Very frequent."

Part II, p.32 (Joseph Stiles):

"A: Some persons have looked to immigration from the northern states into the south to neutralize, in great measure this rebel sentiment; but unless there is <u>protection</u> given to it, it never will be ...
Q: In case the troops were withdrawn, would you anticipate scenes of violence and riot?
A: Yes, sir,towards loyal men and freedmen I would anticipate the expulsion of loyalists."

Part II, pp.34-35 (Jonathan Roberts):

"You asked me whether Union men would be protected and allowed to live quietly if the troops were withdrawn. I have got one thing to say in that respect. If it was known publically that I came here and made this statement before you, I would not be safe one hour .... [The former rebels] are especially revengeful just as far as they think they can escape the law. All the northern people ... will tell you the same thing ... [T]hey would come and tear down my fences, and turn in their hogs and stock, and do all they could to injure me. The Union men will have no kind of show at all unless the government will <u>protect</u> them."

Part II, p.40 (Watkins James):

"I have come to the conclusion, from travelling through the country, that [the] feelings [of the former rebels] towards the freedmen, are more hostile today than they were at the close of the rebellion ... I do not regard the [Union] troops as a nuisance, because I believe they are necessary for my <u>protection</u> .... I knew damned well that I couldn't stand there twelve hours if the troops were gone .... It is a common saying, and they believe it, that we cannot stay there any longer than we are <u>protected</u> by the military."

Part II, p.47 (E.O. Dunning):

"[T]here is as bitter feeling prevalent among the people against the Union citizens at the south--those who sided with the Union cause in the rebellion -- as there was during the war. I do not think that the Union men can stay there, unless they are <u>protected</u> by the United States soldiers."

Part II, pp.49-50 (Calvin Pepper):

"Q: Suppose the Union forces were withdrawn from those localities, what result would it have?
A: I do not believe there would <u>be protection</u> to the colored people or to the loyal white men, or that it would be safe for a loyal white man to reside there.
Q: What would the rebels do?

A: I think we would not be safe in property, liberty or life.
Q: You mean to say that you apprehend scenes of violence and outrage?
A: Yes, sir."

Part II, p.55 (Madison Newby, a recently freed slave):

"A: ... In Surrey County they are taking colored people and tying them up by the thumbs ...
Q: Do they whip them just as much as they did before the war?
A: Just the same; I do not see any alteration in that. There are no colored schools down in Surrey County; they would kill anyone who would go down there and establish colored schools. They patrol our houses just as formerly ... A party of twelve or fifteen men go around at night searching the houses of colored people, turning them out and beating them. I was sent here as a delegate to find out whether the colored people down there cannot have protection. They are willing to work for a living; all they want is some protection ...

Part II, p.57 (Alexander Dunlop, a free black):

"Q: Are you a delegate to the President of the United States?
A: Yes, sir; I was sent by my people convened at a large mass meeting.
Q: For what purpose?
A: My purpose was to let the government know our situation,and what we desire the government to do for us if it can

do it. We feel down there without any protection.
Q: Do you feel any danger?
A: We do.
Q: Danger of what?
A: We feel in danger of our lives, of our property, and of everything else.
Q: Suppose the protection of the Freedmen's Bureau was withdrawn, and the Union troops were withdrawn, what would be the treatment of the whites towards the blacks?
A: In my candid opinion, the condition of the blacks would be worse than slavery .... The protection of the Freedmen's Bureau does not extend as generally throughout the country as it is hoped it will; and in some of these places where the bureau does not extend these people are treated very badly."

Part II, p.72 (John F. Lewis):

"I think that the sending of troops to our country immediately after the surrender of General Lee's army was a great protection and security to the Union people there. There were a parcel of marauders in the country who were giving a great deal of trouble."

Part II, p.97 (See C(3) (Protection of civil rights).

Part II, p.127 (Colonel Brown):

"Q: In the case of the removal of the [Freedmen's] Bureau, would you apprehend a great increase of those

scenes of violence towards the blacks?
A: I should.
Q: What would it result in?
A: I think it would eventually result in an insurrection on the part of the blacks; ... they will not endure those outrages, without any protection except that which they obtain from Virginia."

Part II, p.141 (See C(3) (Protection by courts of rights of union men.)

Part II, p.143 (General Terry):

"Q: In case of the withdrawal of military protection from Virginia what would be the condition of the loyal people in Virginia and of the blacks?
A: I think they would be in a lamentable condition. Such is the prejudice entertained, especially against those who were faithful to their obligations to the government during the war, that I do not think they would receive any adequate protection for their rights of person or property from the people or from the courts; and I think that they would be persecuted through the machinery of the courts as well as privately."

Part II, p.149 (Protection of rights in state court) (See C(3)).

Part II, pp.187-89.

A report reprinted here regarding Freedmen's Bureau activities in North Carolina contained, in a section headed "Protection", a summary of

Bureau activities to protect Freedman from murder, beatings, whipping and thefts by whites, and to punish such offenses. The section concludes, "The efforts of the bureau to protect the freedmen have done much to restrain violence and injustice."

Part II, p.197.

Newspaper account of the killing by rebels of a foreman Union scout, criticizing the local Union commander. "If he has troops enough at his command he should send a sufficient number to protect the government's servants."

Part II, p.199 (Newspaper account quoting letter from North Carolina):

"The government still continues its protection, and the troops appear at places where there is any danger of a collision of the races. The time has not yet come to wholly withdraw all military protection."

Part II, pp.202-03 (Homer Cooke):

"Q: What is [the white] treatment generally of the freedmen?
A: ... [T]he freedmen are treated much better when they are near where the Union troops are stationed; but, from all the evidence that I can gather, I believe that outside, when there is no arm to protect them, they are treated with great cruelty in some cases.
Q: Do you hear of cases of maltreatment of blacks, such as flogging ...

A: I have heard of numerous cases.
Q: How do the secessionists regard the efforts to establish schools among colored people?
A: They are not at all pleased, so far as my observations extend; and it has been very difficult to establish schools, excepting where they are directly under the military protection.
Q: Without that protection, would it be impossible in many localities in North Carolina to keep up a colored school at all?
A: I do not think it would.
Q: Would not the secessionists disperse scholars, drive out the teacher, and tear down the school?
A: I think so."

Part II, p.207 (Reverend Bain):

"I do not think it safe for the negroes to be [in North Carolina] unless some strenuous effort is made for their protection, and for the protection of loyal men. We are classed together. About three weeks ago a mob passed by my house, calling out for the 'old gray-headed son of a bitch of a Yankee sympathizer' .... I really think they will burn my house yet."

Part II, pp.207-09 (Dexter Clapp):

"These would be great danger to any northern man when military protection is withdrawn .... I think that all northern men would be in great danger of personal injury, and that the freedmen would be without any

protection whatever, and subject to great oppression and wrongs of all kinds. I think that killing freedmen would be the rule .... The high price of cotton is the only protection, aside from the military authorities, that I know of for the freedmen."

Part II, pp.218-21 (General Saxton):

"I believe that if the army were removed, the situation of northern men, if they expressed Union sentiments, would be perilous; they could not remain there. Teachers of colored schools throughout the State give it as their opinion that they would be unable to remain there for a day but for the protection of the United States troops .... If it were not for the protection afforded by those troops the officers of the Freedmen's Bureau could not remain there .... There is nothing to fear for the future of the freedmen if the government, which has set them free, protects them, by standing between them and those who sought to destroy this nation and keep them in slavery ...."

Part II, p.223 (report of Freedmen's Bureau in South Carolina):

"Two freedmen were whipped by their master, who took them to the commanding officer at Barnwell .... This officer is reported to pay no attention to the complaints of freedmen. With such an officer in

power, it is hardly possible to protect them from abuse."

Part II, p.230 (Freedmen's Bureau Circular):

"[A]ll commissioners are required to protect those within their jurisdiction in the enjoyment of their rights."

Part II, p. 239 (Captain Ketchum):

"Q: Suppose the protection [freedmen] now enjoy from the presence of federal troops and from the Freedmen's Bureau should be withdrawn, and they should be exposed to the consequences of State legislation and to the prejudice and injustice which it is natural to suppose would be exercised toward them by whites; what, in your judgment, would be the result in the end?
A: I think, in the end, there would be a conflict.
Q: Could they do otherwise than arm themselves to defend their rights?
A: No, sir .... They could not do otherwise than organize to protect themselves."

Part II, p.269 (See C(3)(protection of property rights).

Part III, pp.5-6 (Major General Hatch):

"I do not believe the Union men could remain [in Mississippi] if there were no federal troops there to protect them. There is a great deal of private enmity and intense personal

dislike to them .... In the mountain region of Alabama there are a great many loyal people .... Between them and the people of the other portions of Alabama there is a great deal not only of animosity in regard to the question of secession, but of private animosity. The loyal men in that part of the State may be strong enough to protect themselves, as they have gone home with their arms."

Part III, p.15 (J.J. Gries):

"[T]he freedmen will have to be guarded for a while, and the Freedmen's Bureau will have to throw some protection around them."

Part III, p.17 (Mordecai Mobley):

"A: [A] planter ... drew back and struck the negro as hard a blow as he could with his fist, and then tried to kick him off the platform while the [railroad] car was in motion ....
Q: Did the white man offer to interfere and protect the negro or his property?
A: No, sir .... The truth of the matter is, the southern people don't care anything about it ...."

Part III, p.25 (Ezra Hienstadt):

"The first great requisite, that which I imagine would have the best influence in settling the state of things in Louisiana, would be to maintain there for some years a rigid administration of the Freedmen's bureau, to protect the blacks in

their rights .... I consider that such an establishment would stand as a barrier to the encroachments of one class upon the rights of another."

Part III, pp.31-32 (Major General Fisk):

"Q: What, in your opinion, would be the result of withdrawing the troops from Georgia, Alabama and Mississippi, and of suspending the operations of the Freedmen's Bureau?
A: I think it would be disastrous .... The freedmen would not remain there .... Unless the laborer is assured that he has a government agent set for his protection and defense, he would withdraw, and the condition of things would be too unpleasant for northern men of enterprise to live in that section of the country."

Part III, p.37 (see C(3)).

Part III, p.47 (Union army report concerning Georgia and Florida):

"In order adequately to protect the persons and property of freedmen ... the present number of [Freedmen's Bureau] agents should be increased .... [T]he troops should remain for the protection of northern immigrants.

Part III, pp.61-63 (Mailton Safford):

"There is no question that but for the protecting power of Congress [the southerners] would really or virtually reenslave the freedmen again .... I think norther men would prefer to

look to Congress than to the public sentiment of Alabama for protection."

Part III, p.101 (Major General Saxton):

"A: ... [T]he general impression among all northern men who have gone into business [in Georgia] is that they are persecuted simply because they are northern men and Union men. I think that among the great majority of the white population there, hatred to 'the Yankees', so called, is thorough and intense.
Q: If the military forces of the United States were to be withdrawn, what would be the condition of the avowed Union men and northern men there?
A: I think their position there would be such that it would be hardly possible for them to remain .... I do not think they would be allowed to express openly their Union sentiments without the protection of the United States troops."

Part III, p.133 (1865 amendment to Mississippi constitution):

"[T]he legislature ... shall provide by law for the protection and security of the person and property of the freedmen of this State."

Part III, p.147 (report of Freedmen's Bureau official concerning Mississippi):

"In view ... of the terribly vindictive passions ... controlling the minds of [the southern whites], permit me to respectfully recommend that troops be stationed in that

section of the country, or that the freedmen be protected in removing to some locality where their lives, at least, will be secure."

Part III, p.161 (Alexander Stephens):

"Q: ... [W]hat are the leading objects and desires of the negro population, at the present time, in reference to themselves?
A: It is to be protected in their rights of persons and property -- to be dealt by fairly and justly."

Part III, p.183 (Message of Governor of Mississippi):

"The negro is free, whether we like it or not; we must realize that fact now and forever. To be free, however, does not make him a citizen, or entitle him to social or political equality with the white man. But the constitution and justice do entitle him to protection and security in his person and property, both real and personal.

In my humble judgment, no person, bond or free, under any form of government, can be assured of protection or security in either person or property, except through an independent and enlightened judiciary. The courts, then should be open to the negro .... [W]hether for the protection of the person or the property of the freeman, or for the protection, of society, the negro should be allowed and required to testify."

Part III, p.185 (Georgia Constitution of 1865):

"It shall be the duty of the general assembly ... to provide by law for the government of the free persons of color; for the protection and security of their persons and property..."

Part IV, p.4 (John Recks):

"Q: What protection would there be [in Florida] for colored people if the troops were withdrawn entirely from the State?
A: In the only portion I have any knowledge of, there would be a sufficient number of colored people to thrash them out, with a good commander. Were there not a majority of them, their condition would be very bad."

Part IV, pp.10-11 (Rev. L.M. Hobbs):

"I hear them making their threats, and saying that if they could get the military taken away, 'there would be plenty of dead niggers lying around in the woods' .... [T]he negroes would be shot down like sheep .... If the [Freedmen's] bureau is withdrawn there will be no safety for the freedmen at all; he will not be safe unless there is some protection of that kind for him .... The freedmen must be protected, or else giving him his freedom will be but a farce. The Freemen's Bureau will not be expensive if it is known it is to be kept there and will be used for the

protection of the negro in his just rights."

Part IV, p.45 (Lt. Miller):

> "[T]he Freedmen's Bureau ... is necessary ... as a protection to the freedmen against imposition on the part of their employers, whether southern or northern men .... Without some such institution as the Freedmen's Bureau, to protect the freedmen in his rights, his chance for justice with either party would be very small .... Without the presence of the Freedmen's Bureau, and an armed force to back it, I do not think the life of a freedman coming in the way of one of the disbanded rebel soldiers ... would be worth a cent."

Part IV, p.46 (Lt. Col. Hall):

"Q: What would be the state of the country in which you have been, should the military force ... and the officers of the Freedmen's Bureau be ... withdrawn?

A: ... I would say there would be neither safety of person nor of property for men who had been loyal during the war; and there would be no protection whatever for the negro .... He would be liable to worse treatment than ever before -- to assaults in many instances, and even to murder."

Part IV, p.60 (D.E. Haynes):

"Q: State whether, in your opinion, it is now safe for Union men in Louisiana without the military protection of the government.

A: It is not safe."

Part IV, p.68 (Rev. Joseph Roy):

> "I found the [Freedman's Bureau officials] everywhere seeking to promote the physical comfort of the negroes, and to secure their protection from violence .... [M]any citizens who were not distinguished for their loyalty, also said that the bureau was a necessity for the protection of white people."

Part IV, pp.72-76 (Major General George Custer):

"Q: What would be the condition of the loyal men in Texas now, in case the military protection now afforded were withdrawn from the State?

A: I would not consider it safe for a loyal man to remain in Texas. ... [T]he freedmen ... realize, as all Union men in the State do, that their only safety and protection lies in the general government; and they realize, too, that if the troops are withdrawn, they will be still more exposed than they are now."

Part IV, pp.80-83(Thomas Conway):

> "I think that Union men in [Louisiana] would not be safe in their property or in their persons

without the aid of the military. The negroes, without military aid, or without the aid of the government, would not be able to secure their wages; no justice would be shown them, and they would be murdered .... [T]he negro race would be exterminated unless protected by the strong arm of the government."

APPENDIX C(2)

(2) References to Abuses of Union Loyalists, Northerners, and Other Whites

Part I, p. 114 (see C(1)) (southern loyalists).

Part I, p. 119 (see C(1)) (former Union soldiers).

Part II, pp. 34 (Major General Turner):

> "Union men who have lived in Virginia all their lives tell me they will have to leave as soon as our troops are withdrawn.... These people are now persecuted to death, one might say, by the rebels."

Part II, p. 7 (see C(1) and C(3)) (union man, northerners).

Part II, pp. 16-17 (George Smith):

"Q: How do [the people of Virginia] feel generally towards the freedmen?

A: Hatred. Their hate, first, is to the citizen Union men; their next hate is to the negro; their last is to the Yankees, as they call them.

Q: If left to themselves, what would they do with the negro?

A: They would entirely extirpate him from the face of the earth. They would first commence with the Union men, and then they would take the negro.... It is ... the Union men who has lived among them and taken an active part against them whose life is in jeopardy.

Part II, p. 18 (Dr. G. F. Watson):

"[The people of Virginia] despise ... and will handle roughly ... Union white men."

Part II, p. 23 (see C(1), C(3)) (southern loyalists, northerners).

Part II, p. 29 C(1), C(3)) (southern loyalists).

Part II, p. 32 (see C(1), (3)) (southern loyalists, northerners).

Part II, pp. 33-35 (see C(1), C(3)) (southern loyalists).

Part II, p. 40 (See C(1)) (union men).

Part II, p. 43 (Watkins James):

"A few days ago an anonymous letter was dropped in the post office, notifying the teacher of the freedmen's school that he must leave or take the consequences. About the same time ... two United States detectives were run from New Market. A man named Lamberson ... was shot twice.... This man's offence is, he served in the Union army. The Union

men feel there is great danger. About the same time a teacher of freedmen ... was called on some time in the night by fifteen or twenty persons ... taken to the Shenandoah river ... and held under water some time ... and then threatened, if he did not leave the county in three days, he would be shot dead."

Part II, p. 47 (see C(1)) (union men).

Part II, p. 10 (E. V. Dunning):

"Q. ... [D]o [the rebel people] appear to hate the north as a community?

A: Yes, sir; decidedly.

Q: In case of the removal of the military forces of the United States from these communities, is it likely, in your mind, that there would be scores of violence and riot?

A: I have no doubt of it.

Q: What would be the special object of such violence?

A: I think it would manifest itself against Union citizens and against colored people."

Part II, pp. 49-50 (see C(1)) (loyal whites).

Part II, p. 61 (D. B. White):

"The person who is now deputy sheriff of Elizabeth City county ... expressed his wish to ... drive out

of that part of the country every Union man, whether of the south or of the north."

Part II, p. 63 (D. B. White):

"Q: In case a northern man should purchase real estate among [the secessionists], would he be safe in the enjoyment of his property?

A: I think he would not."

Part II, p. 111 (see C(3)).

Part II, p. 125 (Colonel Brown):

"Q: How are northern men treated in Virginia?

A: Northern men are treated better than Union Virginians. I do not think they would be well treated if the troops were withdrawn."

Part II, p. 141 (See C(3)) (Union men).

Part II, p. 143 (see C(1)) (loyal people).

Part II, p. 153 (Frederick Bruce):

"[I]f the troops were withdrawn from the city [of Lynchburg] no man connected with the United States government would be safe in walking in the streets after dark."

Part II, p. 201 (Homer Cooke):

"Q: Suppose the military forces should be removed entirely from North Carolina?

A: I think the northern people would be compelled to go with them or very soon after....

Q: In such an event would you apprehend violence towards northern men on the part of secessionists?

A: ... [T]o a greater or less extent, either by destruction of their property or by some other means."

Part II, p. 207 (see C(1)) (loyal men).

Part II, p. 208 (see C(1)) (northern men).

Part II. p. 214 (J. A. Campbell):

"I think that if the United States troops were withdrawn from North Carolina the property of loyal men and the persons of freedmen would not be safe."

Part II, p. 218-21 (see C(1) and C(3)) (unionists, teachers in schools for freedmen, agents of the Freedmen's Bureau).

Part II, p. 244 (see C(3)) (northerners).

Part III, p. 3 (Albert Kelsey):

"I know the general feeling among northern men [in Georgia] is that they are not safe; that they are liable not only to be robbed, but to be killed at any moment."

Part III, pp. 5-6 (see C(1))

Part III, pp. 6-7 (Major General Hatch):

"Q: How would it be in Georgia with northern men who might go out there to live?....
A: I do not think tney can live there after our troops shall have been taken away.
Q: How would it be with Union men who are natives of the country, should our troops be taken away?
A: They would suffer more than the northern men.... The feeling towards them is more bitter than towards northern men."

Part III, p. 14 (see C(3))

Part III, P. 24 (Ezra Hienstadt):
"Q: Would it or not, in your judgment, be safe for the loyal people of Louisiana, both white and black, to withdraw from that State at this time the military power and supervision of the federal government?

A: I unhesitatingly say that I do not consider it would be safe for them to do so. My opinion is, that if the entire force of the federal government were withdrawn from the State of Louisiana the Union men, as we call those who were loyal during the rebellion, would be driven from almost all the rural portions of the State at least...."

Part III, p. 27 (see C(3)).

Part III, pp. 30-31 (See C(1)).

Part III, p. 70 (Brigadier General Brisbin):

"Q: What would be the effect of withdrawing the national troops from [Arkansas]?

A: I think it would lead to the expulsion of Union men, and especially of northern men who might desire to go there and settle."

Part III, p. 10 (see C(1))

Part IV, p. 2 (John Recks):

"Q: Do you think the presence of a military force in Florida is or is not necessary to secure the rights of property and the lives of citizens, white or black?

A: I do ... I think ... that if they had the power, they would use it to destroy Union men."

Part IV, p. 8 (Rev. L.M. Hobbs):

"Q: What would be the condition of the Union men [in Florida] should the military be withdrawn?

A: It would be intolerable; they could not remain there in safety; they would be compelled to leave the State. Northern men, especially those who have been in the United States service, could not live there at all.... [T]here is a class of boys ... who would put a bowie-knife or a bullet through a northern man as

soon as they would through a mad dog."

APPENDIX C(3)

(3) References to Unwillingness of States to Protect Lives, Liberty and Property

Part II, p. 4 (See C(1)) (freedmen).

Part II, p. 7 (Judge John Underwood):

"A: I do not believe, from what I have seen, that a Union man could expect to obtain justice in the courts of [Virginia] at this time, certainly not if his opponent was a rebel. The bitterness of feeling is very great, and I think the jury would be at least nine-tenths rebel, and the influence of the court would be the same....

Q: Would these prejudices against a Union man, and particularly a northern man, operate so far with a Virginia jury as to lead them to deny him ordinary justice in a matter of private right?

A: I think they might."

Part II, p. 17 (George Smith):

"Q: What chance does the negro stand to obtain justice in the civil courts of Virginia?

A: Not a particle -- no more than a rabbit would in a den of lions; nor a Union man, either."

Part II, p. 18 (G.F. Watson):

"A: ... There is one ... thing of which I feel fully satisfied; that is, that the loyal men of [Virginia] cannot

get justice in the reconstructed disloyal courts.
Q: Why not?
A: For the reason of the disloyalty of the jurors and lawyers."

Part II, pp. 23-25 (George Tucker):

"The Freedmen before any [Virginia] juries stands no chance of obtaining his rights, although he will stand as good a chance as a Yankee will, or as a native-born citizen of Virginia who has been a loyal man. The latter even stand a worse chance. "... [W]hites have not any idea of prosecuting white men for offenses against the colored people; they do not appreciate the idea."

Part II, p. 29 (Josiah Millard):

"Q: Suppose you should be murdered by an ex-rebel out of revenge and from dislike to you as a Union man, and suppose your murderer should be indicted and prosecuted in the proper court the district, and a jury should be called under the existing laws of Virginia, have you not grounds to suppose that, in case the evidence was plain and clear, the jury would convict that man?
A: That would depend upon the circumstances very materially. If the case was very plain and clear, and there was no possible chance to cover it up, the jury might bring in a verdict of guilty, but it would be very pressing circumstances that would compel them to do it. [I]f there was no possible chance to avoid

it. I have seen cases tried ... which, to me, were as plain as the sun that shines, and the verdict was entered quite the reverse.
Q: And that you suppose, is owing to the prejudice felt generally by rebels against Union men?
A: Yes."

Part II, p. 32 (Joseph Stiles):

"Q: What chance does a Union or a northern man stand in [Virginia] State courts?
A: No chance at all.
Q: Why not?
A: The popular feeling is against him altogether.... [T]here is no show for justice to Union men in any case that affects rebels.
Q: What chance does a freedman stand for justice at their hands?
A: As a general thing, he does not stand any chance for justice at all."

Part II, p. 33 (Jonathan Roberts):

"Q: How much chance is there for a Union man in the courts of [Fairfax County, Virginia] who should be a party against a rebel in a suit?
A: None; not so far as justice goes .... [W]hen we come to a jury, we have to take the masses as they come, and there is no chance at all for justice....

[T]here was a case tried of a returned rebel who shot a Union man at Falls Church.... The evidence was just as plain and positive as it could be -- indeed, the facts were admitted; and yet the jury brought in

a verdict of manslaughter, with one year's imprisonment. Nine of them went for acquitting him entirely; but the three Union men would not agree to it, and finally they compromised with one year's imprisonment. If it had been the other way, or if a rebel had killed a rebel, there would have been no doubt at all about his conviction."

Part II, p. 38 (J. J. Henshaw):

"Q: Would you not feel pretty safe in any of the civil courts of Virginia--you, a Union man; would you not expect impartial justice from a court and jury if you were an accused person in the court, or were suing there for redress of any of your wrongs?
A: I do not believe that you could get an impartial jury hardly in our county to try a case between an avowed Union man and an avowed secessionist."

Part II, p. 50 (Calvin Pepper):

"Q: How much chance does a northern Unionist stand in a State court in Virginia in the prosecution of his rights?
A: A very poor chance.
Q: In an ordinary suit between a loyalist, whether northerner or southerner, and a rebel, would you expect that justice would be fairly administered by a State court and a jury in Virginia.
A: As a general rule, I do not.... Within the last six months I have had

more than a hundred complaints made to me with reference to the abuse of freedmen by the rebels, or at their instigation. They have been beaten, wounded, and in some instances killed; and I have not yet known one white man to have been brought to justice for an outrage upon a colored man."

Part II, p. 63 (D. B. White):

"Q: What chance has a northern man or a Unionist for justice in the State courts of Virginia?
A: He has not any chance at all.- I would not go before one of those courts, if I could avoid it, under any circumstances, because there is no justice there at all.
Q: When you say there is no chance, do you mean to say that the bias and ill-feeling on the part of court and jury are so great against the Unionists north and south that they would not be able to obtain their rights?
A: Yes, sir. The bias is so great that they could not even entertain a hope of getting justice according to their interpretation of their own State laws."

Part II, p. 97 (Lieutenant W. L. Chase):

"Q: Are not the civil rights of the people protected there in the State courts?
A: I do not think a loyal man could get his rights in the courts, there is such a prejudice against refugees and against the northern men.

Q: Do you think that prejudice would affect the mind of the court and jury?
A: Yes, sir; I think it would."

Part II, p. 111 (William Dews):

"Q: What chance does a Unionist stand to get justice in the State courts?
A: I should not suppose, with perhaps a few exceptions, that he would have any chance; that is the impression of all the Union mean.... [T]hey are convinced that they cannot have justice done them on account of the prejudice against them."

Part II, p. 127 (Colonel Brown):

"Q: Would the negro stand any chance of obtaining justice in the courts?
A: I have the assurance of one of the first lawyers in the city of Richmond that his opinion is that the negroes could not obtain justice before a Virginia jury.
Q: Justice to the negro and justice to the white man are different articles, I suppose; it changes with the complexion?
A: Yes, sir."

Part II, p. 141 (General Terry):

"Q: Are Unionists secure in the enjoyment of their rights in the midst of a secession community there?
A: I do not think they are.
Q: Can they safely rely on the State courts for justice to themselves and for protection of their rights?
A: No, sir. I think not.

Q: How would it be, for instance, in a suit between a strong Union man, whether residing there or from a loyal State, and a secessionist. Would you apprehend that a jury, called in the regular way in Virginia would be prejudiced against a Union man?
A: ... [S]uch is my impression in regard to the feelings of secessionists towards Union men that I think that the rights of the latter, under these circumstances, would not be secured."

Part II, p.143 (see C(1)).

Part II, p. 149 (Manasseh Blackburn):

"Q: What chance does a black man or a Unionist stand in the State courts for justice and the protection of his rights?
A: I would doubt whether a Unionist can get justice. He might in some pecuniary matters get justice, but I doubt whether in other things he could. I think that, as far as the blacks are concerned in the valley, they would in pecuniary matters get justice -- they could collect bills, or anything of that kind."

Part II, p. 150 (Rev. Hunnicutt):

"Q: Do you think that Union men, whether from the north or residents in the neighborhood, are secure in the civil courts of justice of the State?
A: I do not believe that any of us will get justice done.... [T]he testimony of negroes will not be worth a snap of your fingers.... [T]here are the

judges, the lawyers, and the jury against the negro, and perhaps every one of them is sniggering and laughing while the negro is giving his testimony."

Part II, p. 153 (Frederick Bruce):

"Q: How much chance does a Union man stand in that region for obtaining justice in the courts of the State?
A: My honest impression is that a leading Union man -- one who had made himself notorious or conspicuous as such, as against a southern man who had been in the rebellion -- would not have an equal show in the courts of justice.... [T]here are men there who would not under any circumstances do justice to a Union man in a controversy between him and a secessionist."

Part II, p. 169 (Rev. James Sinclair):

"Q: Under the present laws, and with the present courts in North Carolina, how much security is there for commercial men of the north in the transaction of their business?
A: I reckon they would have no security at all just now....
Q: Take the case of a northern man who is a suitor before the courts for his rights, with a case that is to be tried before a jury; would he stand a fair chance against his opponent should his opponent be a rebel?
A: No chance at all for a citizen of the State, in my opinion, if he is obnoxious to the people politically."

Part II, p. 175 (Lt. Sandeson):

"[If the union forces were withdrawn] the freedmen ... would have no chance in court ... he could not enforce contracts if he made them, and no jury that could be impanelled would give a verdict in his favor."

Part II, p. 209 (Dexter Clapp):

"A: ... of the thousand cases of murder, robbery and maltreatment of freedmen that came before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons ....
Q: Do you suppose that the omission on the part of the authorities to interfere and enforce justice arises from their own fears of the ruffians, or from their sympathies with the ruffianism?
A: I think it comes from both causes....
Q: How did Governor Holden demean himself towards such outrages; did he make any efforts as governor of the State to punish them?
A: I know of no such efforts that he has made.... I have known of several instances in which outrages were committed, and in which he exerted his influence with the military authorities to have them passed over."

Part II, p. 215 (J. A. Campbell):

"Q: Are the rights of Unionists from the north and south safe in the Sate courts of North Carolina?
A: ... I do not think they would be. If I had any property I would not trust it before the courts there as against a rebel.
Q: ... Would a unionist be likely to receive an impartial verdict at the hands of a North Carolina jury?
A: I do not think he would."

Part II, p. 218 (General Saxton):

"Q: What chance do Unionists, especially Unionists from the north, stand for <u>protection</u> and security in the State courts of South Carolina?
A: ... It is my opinion they would stand a very poor chance. ... Northern men would probably fare just as bad in the courts as freedmen, and it is my belief that there are large numbers in South Carolina who would consider it no greater crime to kill an agent of the Freedmen's Bureau than to kill a negro."

Part II, p. 225 (Report of Freedmen's Bureau in South Carolina):

"It is stated that the superior provost court here is outrageously unjust towards freedmen and northern whites whenever they are opposed by secessionists. That the court being violently secession in sentiment, while allowing negro testimony gives it no weight whatever if white witnesses appear on the other side. A case is reported where a horse in the possession of a freedman was

taken from him and given to a late rebel soldier, the cost of court, ten dollars ... being adjudged against the freedman, although the freedman brought full proof that the horse came into his possession a longtime previous to the date given by the soldier as the time he lost him."

Part II, p. 244 (J. V. Alvord):

"Q: Do you regard it as safe, as a general rule, for northern men to go down [south] and attempt to settle and become residents?
A: It would not be for those who favored the government and the interests of the freedmen, if the military were withdrawn; it would be very unsafe.
Q: Would such settlers probably be subjected to violence and insult?
A: To all sorts of insult, and probably to violence in very many cases.
Q: Would they not be able to obtain justice in the southern courts if they were thus treated?
A: They would probably obtain a hearing, but I think they would hardly secure justice.
Q: Why not?
A: From the strength of southern prejudice against northern people.
Q: You think that prejudice would pervade seen the juries who would be called to try the case?
A: I think it would.
Q: Do you think it would generally affect the decisions of the judges upon the bench?
A: I should fear it might. I learned of cases where the court was very partial to the old class of

southerners who came into litigation with northern-born men or negroes."

Part II, p. 269 (Lt. Colonel Beadle):

"Q: By the laws of North Carolina, would a free black man be allowed to own land?
A: They have been, and some now do, ... but their protection is very uncertain, and I have had cases where colored persons had great difficulty in retaining the property. It had passed into hands of agents, lessees, and others; and the colored man once losing possession, has great difficulty in obtaining redress from a civil court....
Q: Have you discovered such a prejudice against the black man in North Carolina as would restrict his rights in the State courts?
A: Yes, sir....
Q: In your judgment, does that prejudice infect the judges themselves; or is it confined to the juries?
A: There is hardly a southern man ... but is prejudiced against allowing a colored man equal civil rights, equality before the courts, in fact (though they may do it in form)."

Part III, p.14 (J.J. Gries):

"Q: What would be the condition of the loyal men of Alabama ... should the Union troops be withdrawn?
A: They could not live there at all. I have been driven from my home for three years .... When I returned they took by civil law all the corn raised on my place .... They took it by

false testimony. ... Every judge in our State is a rebel .... We could fill a book with facts of wrongs done to our people there ... A great many ... were robbed by friend and foe almost."

Part II, p.27 (Major General Thomas):

"Q: If the national troops and the Freedman's Bureau were removed from Alabama, what results would you anticipate in regard to freedmen?
A: If that were done at this time, I do not believe that the freedmen or that Union men could have justice done them.
Q: What form would the injustice be likely to take?
A: It would commence with suits in the courts for petty offenses, and neighborhood combinations to annoy them so much ... that they could not live there in any peace and comfort."

Part III, p.37 (Brigadier General Howard):

"Q: Suppose the shield of legal protection should be thrown around [the] domestic relations [of freedmen], would that protection be respected by the whites in South Carolina practically?
A: If it were mere law, I should apprehend that it would be entirely inadequate in the present state of public sentiment. In fact, I may say generally that laws may be made impartially in South Carolina, but with the existing public sentiment they would not be sufficient for the

protection of the negroes in their rights.

Q: Suppose a white man should dishonor a black husband, by having illicit intercourse with his wife, obtained either by violence or seduction, would the black husband, in a South Carolina court, have much prospect of obtaining redress?

A: I think not.

Q: Would a white jury give him damages?

A: I think not, sir .... I feel certain that he could not get adequate redress. They might award him something as a cover, for the appearance of the thing ...

Q: Suppose a black man should bring suit in a State court there for the redress of any other wrong to his person or property, would he be likely to obtain adequate redress.

A: I believe not ..."

Part III, p.47 (Union army report concerning Georgia and Florida):

> "Public sentiment is such that even should the laws be made impartial, the negro could not obtain redress for wrong done him in person or property."

Part III, p.184 (report of Freedmen's Bureau concerning Mississippi):

> "The negroes of this section have remained on their former plantations since the surrender; but when the crops were gathered many were driven away by threats or abuse, and all law that protects the freemen and insures compensation to the laborer has been

withheld from them. They are absolutely without law. The codes of Mississippi direct that in order to prosecute a claim, or bring suit against any party, the plaintiff must give security for the cost, should the case be decided against him -- a condition that, perhaps out of the entire population of the blacks in the State, not one in a hundred would be able to comply with, while the remaining ninety and nine are left to the caprice of the capitalist."

Part IV, pp. 60 (D.E. Haynes):

> "[Several former rebels] beat me violently .... The occasion was that I had been in the Union army.... I ... went to Alexandria, and while there endeavored to employ a lawyer .... He would not take the case ... I found that the reason why he would not take the case was that he would lose caste in that community by allowing himself to be employed by a Union man. My intention was to prosecute these rebels, two of whom had shot me, and others had committed a violent assault and battery upon my person, and still others had robbed my wife.... [A]ll those I consulted told me it was no use to sue for damages; that no Union man could get damages...."

Part IV, p. 75 (Major General George Custer):

> "[T]he great mass of the people [in Texas] seem to look upon the freedmen as being connected with, or as being

the cause of, their present condition, and they do not hesitate to improve every opportunity to inflict injuries upon him in order, seemingly, to punish him for this. This feeling exists to a certain extent, and is often manifested in their courts.... [S]ince the establishment of the provisional government in Texas the grand juries throughout the State have found upwards of five hundred indictments for murder against disloyal men, and yet in not a single case has there been a conviction, while in one judicial district ... the judge ... stated that fourteen negroes had been tried within his jurisdiction for various slight offenses; that the fourteen had all been convicted and sentenced to various terms in the State prison. And to show you the manner in which justice is meted out in their courts towards the freedmen, one was tried and convicted of stealing one bushel of sweet potatoes, and sentenced to the penitentiary for two years. ... [I]t is of weekly, if not of daily, occurrence that freedmen are murdered.... [S]ometimes it is not known who the perpetrators are; but when that is known no action is taken against them. I believe a white man has never been hung for murder in Texas, although it is the law."

Part IV, p. 89 (John T. Allen):

"If it be left entirely to the verdict of a jury, as in cases between white man and white man, it

will be found that jurors ... cannot entirely rid themselves of their old prejudices. ... I have seen men who were just as good jurymen as I would wish to have in a jury box in ordinary cases pay no attention to, but utterly disregard, the evidence in a case where a white man and a black man were concerned."

Part IV, p. 153 (T. J. Mackey):

"Q: In the rural districts of Texas are the lives and property of freedmen secure as against the prejudices and feelings of the people?
A: They are not; they are very far from being secure.
Q: Have you heard of many homicides being committed upon the freedmen.
A: Yes, sir; of many.
Q: And do the State authorities interfere in those cases?
A: Wherever the case is brought to the attention of the civil authorities, action is taken so far as to issue writs of arrest; but it is almost, if not quite, impossible to secure the necessary testimony to convict parties.... [I]n Louisiana ... the prevailing sentiment is so adverse to the negro that acts of monstrous crime against him are winked at."